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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APR 08 2016

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

79206

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2013-CP-40-4051

Andreas Ganotakis, d/b/a Seven Days Food Mart, LLC,.....Appellant,

v.

City of Columbia Board of Zoning Appeals,.....Respondent.

PETITION FOR REHEARING

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The Appellant respectfully requests a rehearing in this matter pursuant to Rule 221, SCACR. The specific supporting grounds for this petition are set forth and discussed below.

STATEMENT OF THE CASE

The Respondent's denial of the Appellant's request for a special exception to open a liquor store was arbitrary and capricious; furthermore, the Respondent did not follow its own guidelines for granting special exceptions for liquor stores in C-3 districts. The City of Columbia unlawfully hired private counsel to argue interpretation and/or enforcement of laws on zoning board issues before the Respondent which is an agency of the City of Columbia. The City of Columbia hired private counsel to influence the Respondent's decision to deny the Appellant's request for a special exception only because the Appellant's business was a liquor store.

The Appellant filed a letter of agency and an application for a special exception for a liquor store located at 5050 Fairfield Road, Columbia, South Carolina on May 15, 2013. [R. pp. 087-088.] The application summary lists the case number as 13-041-SE and states that the building is located in a C-3 (General Commercial) zoning district. [R. p. 083.] Notice of the Appellant's public hearing was posted on the property and published in a newspaper.

A hearing was held before the Respondent on June 11, 2013, to consider the Appellant's request for a special exception to operate a liquor store. The Respondent heard oral arguments from the parties against and in favor of granting the request for a special exception to operate a liquor store. [R. pp. 114 -126; BOZA Video filed separately.] The Respondent heard from Chaplin Spencer, private counsel hired by the

City Council, and several other witnesses opposing the request for special exception. [R. p. 116, line 26 – p. 120, line 2.] The Appellant never received notice nor did the Appellant have any knowledge that Chaplin Spencer would appear on behalf of the City Council and argue against granting the special exception. At the conclusion of the hearing, the Appellant's request for a special exception was denied. [R. pp. 001-002; 064-065.]

By letter dated July 12, 2013 to the Circuit Court, the Appellant timely filed his appeal of the Respondent's Order with a case number of 2013-CP-40-4051. [R. p. 037.] The Respondent filed its' Return on August 22, 2013. [R. pp. 028-029.]

A hearing involving the Appellant and Respondent was held in a Richland County court on March 7, 2014, before the Honorable Eugene C. Griffith, Jr. The Appellant presented a brief and the Respondent provided the court with Memorandum of Law in Opposition to Petition for Appeal for the court's review. [R. pp. 014-027; 030-034.] In addition, counsel for the Appellant presented oral arguments to the court regarding the facts and law in favor of reversing the Respondent's decision and granting the special exception; counsel for the Respondent presented oral arguments in opposition to affirming the Respondent's decision and denying the Appellant's special request. [R. pp. 040-062]. On June 4, 2014, the Circuit Court issued an Order affirming the Respondent's decision to deny the special exception to the Appellant. [R. pp. 003-011.]

The Appellant timely filed his Motion for Reconsideration on June 11, 2014. [R. pp. 035-036.] The Appellant's Motion for Reconsideration was denied by Order of July 30, 2014. [R. pp. 012-013.] The Appellant filed his Notice of Appeal on August 25, 2014. [R. pp. 038-039.]

ARGUMENT

Arbitrary and Capricious Determination

The Appellant contends that the Respondent's decision to deny the Appellant's request for a special exception to open a liquor store was arbitrary and capricious and not supported by any factual evidence. Furthermore, the Appellant contends that the Respondent did not follow its own criteria for granting special exceptions for liquor stores in that mixed use district.

Pursuant to powers enumerated under *Sec. 17-112 of the City of Columbia Code of Ordinances*, The Board of Zoning Appeals has the power to grant special exceptions in C-3 general commercial districts considering only the following criteria:

1. Traffic impact;
2. Vehicle and pedestrian safety;
3. Potential impact of noise, lights, fumes, or obstruction of air flow on adjoining property;
4. Adverse impact of the proposed use on the aesthetic character of the environs, to include the possible need for screening from view; and
5. Orientation and spacing of improvements or buildings

In addition, the powers enumerated under *Sec. 17-112 of the City of Columbia Code of Ordinances* 2 (b)(5)(6) states that the zoning board "shall not vary the conditions and/or provisions of sections 17-259 through 17-274 that establish specific standards that must be met prior to the establishment of several principal uses that require a special exception; and the board of zoning appeals may prescribe a time limit within which the action for which the special exception is required shall be begun or completed, or both. [R. pp. 127 – 129.]

The Respondent, in its Order, found that granting the special exception would adversely affect the public interest of the area due to the proximity to a school, that a

"proliferation of liquor stores" would result in a depreciation in homes values in the surrounding area, that the liquor store would create vehicular or safety problems for that street, and that the liquor store would impact the aesthetic character of the area.

Favorably, the Respondent determined that granting the special exception would not negatively impact traffic circulation or would not create noise, lights, fumes, or otherwise cause any obstructions to the detriment of adjoining properties or would negatively impact the orientation or spacing of improvements. [R. pp. 001-002; 064-065.]

There was no credible evidence in the record that the Appellant's store would adversely affect the public interest due to the proximity to a middle school nor is there any evidence that there is a "proliferation of liquor stores in the area;" neither of these two are listed in the criteria for granting special exceptions. The Respondent referenced how the Petitioner's liquor store would adversely affect the middle school and how a "proliferation of liquor stores in the area" would contribute to depreciation in home values; however, the record clearly showed that there is one liquor store (Northway Package Store) directly in front of Alcorn Middle School; however, the record shows no "proliferation" of liquor stores as there are no other liquor stores on Fairfield Road within one-mile proximity of Alcorn Middle School. [R. pp. 067 – 068, 070 – 076.] In fact, nine (9) out of the fifteen (15) stores that the residents testified to as selling alcohol (as part of their evidence at the hearing) were not even located on Fairfield Road. [R. p. 073.] Furthermore, the record reflected that nine (9) of the stores were gas stations, two (2) were grocery stores, two (2) were drug stores, and only two (2) other businesses were sole liquor stores. The Respondent's assertion of a proliferation of liquor stores was merely opinion and conjecture and not supported by any evidence in the record.

No witnesses provided specific competent or specific factual evidence of actual injury to their respective properties to the Respondent to warrant denying the special exception. [R. p. 115, line 35 – p. 124, line 32.] The residents presented crime statistics for the area and it only showed that the Appellant's business was burglarized once over a one year period. [R. pp. 078 – 080.] In addition, these same statistics showed no crime occurred at either the Food Lion or the Northway Package liquor store and both are located across from Alcorn Middle School; both of these businesses also sell alcohol and are next to the Appellant's place of business. [R. p. 082.] Officer Hartley was asked specifically whether " the data shows a correlation between the increase of liquor stores and the increase of crime, her response was, "Specific to liquor stores it does not support an increase in crime." [R. p. 124, lines 13 – 32; BOZA Video filed separately.]

In *Bannum v. City of Columbia*, 335 S.C. 202, 516 SE2d. 439 (1999), our Supreme Court reversed the decision of the zoning board based upon the finding that the board's decision was arbitrary. In *Bannum*, the applicant requested a special exception to operate a half way house in the City of Columbia. At the hearing, opposing parties testified to their objections to granting the special exception for the half way house based upon traffic concerns, foot traffic, and a study indicating that these individuals living in the half way house are likely to repeat committing crimes. The City of Columbia's zoning board denied the request for a special exception based upon this testimony. Our Supreme Court determined that there was no "concrete" evidence to support the opposing parties' views and opinions; furthermore, the Supreme Court determined that the board ignored all evidence offered by the applicant to show

satisfaction of the exceptions to the ordinance requirements. The court concluded that the board's decision was based on the unsubstantiated concerns and testimony of the neighboring residents rather than on the requirements for a special exception set out in the ordinance.

In *Windham Enterprises v. The City of North Augusta*, 735 S.E.2d 659 (S.C.App. 2012), the Court of Appeals reversed the decision of the zoning board based upon the finding that the board's decision was arbitrary and capricious and reaffirming the decision in *Bannum*. In the *Windham Enterprises* case, the applicant sought a special exception to operate a fireworks store. At the hearing for the special exception, residents testified as to their objections to granting the special exception for the fireworks store based upon traffic concerns, a concern that the store would cause a decline in property value, and based upon the negative effect the store would have on the community. The zoning board denied the special exception due to the concerns of the residents. The Court of Appeals reversed this decision and held that the board's decision must be supported by competent, substantial, and material evidence. The Court of Appeals determined that the testimony of the residents did not meet that competent standard because the residents did not testify as to any specific injury to their own property nor did the residents sufficiently articulate how the fireworks store would either depreciate their individual property or stand in contrast to other commercial businesses in the area that did not need to seek a special exception.

In support of its conclusion on this issue, this court cited *Rest. Row Assoc. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). Yet, this case allows the appellate court to address the Respondent's finding of facts when it is "arbitrary or

clearly erroneous.” The issue in *Rest Row* surrounded whether the appealing party proved an unnecessary hardship at the zoning board hearing to obtain a hardship. In *Rest Row*, the appealing party had the sole burden of proof of unnecessary hardship to establish the variance because an “adult” store by rule was not allowed in the district. The zoning board determined that the appealing party had not met its burden and therefore the board’s findings of facts were conclusive.

The Appellant’s case presents no similar issue as was stated in *Rest Row*. The Appellant had no such burden of proof because liquor stores are allowed in the district so long as the criteria was followed and met. In addition, Columbia city’s ordinance allows a party to conform and/or modify the business to allow the business an opportunity to meet the criteria. The Appellant offered to remove any signage and agreed to comply with any conditions the Respondent would have prescribed to obtain the special exception. There were other alternatives available to Respondent since the Appellant already sold beer and wine at that business location; however, the Respondent chose to ignore them.

The general rule is that reviewing courts will not disturb the findings of the zoning boards unless such findings or decisions resulted from action of the board which is arbitrary, an abuse of discretion, illegal or in excess of lawfully delegated authority; furthermore, the board must apply the criteria imposed by the zoning ordinance in either granting or denying a request for a special exception. See *Bannum. Vulcan Materials Co. v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) states that “the decision of the zoning board will not be upheld where it is based on errors of law, . . . or where there is no legal evidence to support it, or where

the board acts arbitrarily or unreasonably, . . . or where, in general, the board has abused its discretion."

In this case, the Respondent acted arbitrarily as there was no evidence to support its conclusions. The witness testimony was speculative, there was no competent evidence to support that the Appellant's liquor store would create vehicular or pedestrian safety problems, and there was no testimony or evidence of increased accidents or pedestrian problems before the Appellant's application for the special exception nor was there any testimony or competent evidence presented which distinguishes why the Appellant's store would pose a greater risk than either Food Lion or Northway Package since all of these stores are all located on the same side of the road and within close proximity to each other. In fact, the Appellant's business sells beer and wine already at that location and there was no testimony about prior problems with vehicle or pedestrian safety.

The Appellant would remind this appellate court that the Appellant's position is identical to the fireworks store owner's position in *Wyndham Enterprises* which this court has already decided. In this case as well as *Wyndham Enterprises*, residents testified as to concerns about increased traffic, concerns about decreased home and property values, and concerned about the aesthetics of the business. In this case as well as *Wyndham Enterprises*, witnesses testified exclusively on conjecture and general opinion with no competent testimony as to any specific injuries to their respective property. In this case as well as *Wyndham Enterprises*, the Respondent's decision was arbitrary and capricious and "was not supported by competent, substantial, and material evidence."

The Respondent's decision to deny the Appellant's request for a special exception to open a liquor store was arbitrary and capricious and was not supported by any factual evidence to support its decision. The Respondent's decision was based upon opinion and conjecture with no competent evidence to support the testimony of the witnesses in opposition of granting the special exception. The trial court failed to consider all the factors that illustrated that the Respondent's decision was arbitrary and capricious; the trial judge abused his discretion. Therefore, this Court also erred in affirming the trial judge's based upon the *Rest Row* case. This Court also erred by not considering previous rulings on the issue of arbitrary and capricious decisions by a board as set forth in *Bannum and Wyndham Enterprises*. While this Court cannot substitute its own judgment for that of the trial judge, this Court it has the power to do so when the trial judge's decision was erroneous. According, this Court should grant a rehearing, reverse on this issue, and grant the Appellant's request for a special exception.

Conflict of Interest

The Appellant contends that there was a conflict of interest between the board, city council, and private counsel. In addition, the Appellant contends that city council violated its own ordinance in by influencing the board in the board's decision making role through private council. City's council's influence was a contributing factor in the board's decision to deny the Appellant's request for a special exception; the denial of this special exception was actual prejudice to the Appellant.

In affirming the trial court's decision, the Court does not address whether there was in fact a conflict of interest between the parties; furthermore, this Court does not

address whether City Council violated its own ordinance by sending private counsel to influence the board in the board's zoning decision.

Sec. 17-81 of the City of Columbia Code of Ordinances addresses the responsibilities of the zoning administrator in its relationship with the City Council and states as follows:

Responsibility for administration.

- (a) *Zoning administrator.* A zoning administrator designated by the city manager shall administer and enforce this article. The zoning administrator may be provided with the assistance of such other persons as the city manager may direct. It is the intent of this article that all questions of administration and enforcement shall first be presented to the zoning administrator and that such questions shall be presented to the board of zoning appeals only upon reference by, or appeal from, the zoning administrator, and that recourse from the decisions of the board of zoning appeals shall be to the courts as provided by law.

- (b) *City council.* It is further the intent of this article that the function of the city council under this article **shall not** include hearing and deciding questions of interpretation and enforcement which may arise, but that the city council shall have **only** the responsibility for acting on proposals for amendment or repeal of this article, and for establishing a schedule of fees and charges as provided in this article.

The Appellant contends there was a conflict of interest between the Respondent, City Council, and private counsel. Private counsel appeared to serve as both an advocate for City Council and an advisor to the zoning board in this adversarial hearing to the detriment of the Appellant. City Council was clearly aware that it could not send the city attorney to argue council's position before the board, so it sought to circumvent their own ordinance by hiring and sending private counsel down on council's behalf.

This Court appears to ignore the fact that the city attorney never appeared before the zoning board to state City's Council's behalf even though the city attorney's sole duty is to appear on behalf of the city and all of the city's departments and/or to approve all documents and contracts related to the City of Columbia's daily business. The Appellant contends the city attorney could not appear because of the obvious and inherent conflict of litigating a matter where the city attorney represents both the interests of City Council and the interests of the Respondent and where the city attorney would be unlawfully attempting to influence the Respondent on behalf of City Council. The city attorney clearly knew that the Respondent had the sole power to grant special exceptions in C-3 general commercial districts and that City Council was required to play absolutely no role in either interpreting or influencing the decisions of the Respondent. See *S.C. Ann. § 6-29-800, Sec 17-112; Sec. 17-81*. This Court appears to never consider the question as to whether or not the city attorney for the City of Columbia could have appeared before the Respondent to argue against granting the special exception to the Appellant. The Appellant would contend that if this Court was to answer "no" to this above stated question, then a conflict of interest existed with private counsel at the time of this hearing which warrants reversal of the Respondent's decision to deny the special exception to the Appellant. The Appellant was prejudiced by this conflict which resulted in the denial of his request for a special exception.

There is no indication that the trial judge considered whether there was a conflict between City Council, the board, and private counsel before the trial court made its decision. Furthermore, there is no indication that the trial judge considered whether City Council violated the city's ordinance in hiring private counsel to influence a zoning board

decision. The Appellant contends City Council willfully acted outside the scope of its powers to influence the Respondent and this undue influence resulted in prejudice to the Appellant when his request for a special exception to open a liquor store was denied. The trial court's decision that there was no conflict of interest was erroneous because it did not consider the above-stated facts; therefore, the trial court's decision was reversible based upon an abuse of discretion. By failing to address these issues in its decision, this Court overlooked clear evidence of a conflict of interest and prejudice to the Appellant from the denial of this special exception. While this Court cannot substitute its own judgment for that of the trial judge, this Court it has the power to do so when the trial judge's decision was erroneous. Accordingly, this Court should grant a rehearing, reverse on this issue, and remand with instructions that a conflict of interested existed between the parties and that the Appellant was prejudiced by the conflict.

CONCLUSION

Based on the arguments and authorities set forth above, as well as those contained in the Appellant's Brief, the Court should grant the petition, conduct a rehearing in this matter, and reverse the result below.

Respectfully submitted,



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April 8, 2016

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APPEAL FROM RICHLAND COUNTY
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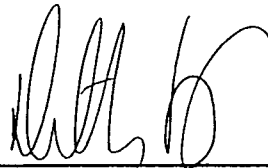
v.

City of Columbia Board of Zoning Appeals,.....Respondent.

PROOF OF SERVICE

The undersigned counsel for the Appellant hereby certifies that the Petition for Rehearing was served and delivered upon counsel for the Respondent by U.S. mail to: Peter M. Balthazor, Riley Pope & Laney, LLC, P.O. Box 11412, Columbia, SC 29211.

April 8, 2016



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April 8, 2016

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

RE: Andreas Ganotakis, v. City of Columbia Board
Appellate Case No.: 2014-001824

Dear Ms. Kitchings:

Enclosed please find one original and seven (7) copies each of the following materials: 1) Petition for Rehearing and Proof of Service. Also, enclosed is the check for the filing fee. Please file the originals and other copies return the extra stamped copies.

By copy of this letter, I am serving opposing counsels with these documents.

With kind regards,



Dietrich A. Lake

cc: Peter M. Balthazor (w/enclosures)